CTAP CASELAW UPDATES[1] – DECEMBER 2007

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Water Law

Faust v. Utility Solutions, LLC (Montana Supreme Court, 2007 MT 326, on appeal from the District Court of the Eighteenth Judicial District of Montana, December 11, 2007)

Summary: When plaintiffs do not obtain an injunction against a activity alleged to be done without the requisite governmental permits, the appellate court may not ultimately reach the merits of their case if the claims are mooted by the intervening issuance of the permit. Only the DNRC, attorney general, or county attorney may initiate an action to enforce the Montana Water Use Act's civil penalty provisions.

This is the first of the Montana Supreme Court's quartet of decisions this month on injunctions and appeals. Defendant corporation, under contract with a local water district to provide water and sewer services, applied to Department of Natural Resources and Conservation (DNRC) for permits to appropriate groundwater to serve district residents. DNRC issued conditional permits that authorized defendant to pump only after final approval was granted, but defendant began pumping groundwater before that approval was issued. Plaintiffs – landowners and water rights owners in the area – filed suit against the defendant corporation for the appropriations as violations of the Montana Water Use Act. Pending appeal of the district court's dismissal of the action for lack of standing, the DNRC granted the final approval to the defendant.

The Supreme Court held that the appeal was moot, as injunctive relief is "to afford preventive relief only," and defendant had ceased violating the Act. The court also held that there is no private right of action to enforce the Act's civil penalty provisions – that right belongs only to the DNRC, the attorney general, or a county attorney. However, the court emphasized that is was not addressing whether such a private right of action exists to obtain injunctive relief under the Act.

[1] Disclaimer – This information is not intended to constitute legal advice and should not be relied upon or used as a substitute for consultation with your own, your agency's, or your organization's licensed attorney. These case summaries are provided as technical assistance to county, municipal, state, and regional planning commissions, zoning commissions, parks or recreation boards, community development groups, community action agencies, and similar agencies created for the purposes of aiding and encouraging orderly, productive, and coordinated development of the communities of the state and to assist local governments in discharging their responsibilities.

Planning, Zoning and Subdivision Law

Henesh v. Board of Commissioners (Montana Supreme Court, 2007 MT 335, on appeal from the District Court of the Eighteenth Judicial District of Montana, December 13, 2007)

Summary: If challengers to a land use approval do not seek an injunction against the project or seek to stay a judgment against them on appeal, the appellate court may not ultimately reach the merits of their case if the claims are mooted by the intervening construction of the project or sale of the property to third parties.

The second of the Montana Supreme Court's quartet of decisions this month on injunctions and appeals. Plaintiff challenged Gallatin County's preliminary approval of the Dry Minor Subdivision, but did not seek to enjoin the County's approval of the project. After the district court granted the County's motion for summary judgment, the plaintiff appealed the judgment, but again did not seek to stay the judgment or the approval. During the pendency of the appeal, the County issued final approval of the subdivision and the lots were sold to a third party. The Court, citing *City of Bozeman v. Taylen*, 2007 MT 256 (see CTAP Legal Updates, October 2007), held that plaintiff's appeal of the judgment was moot, since the plaintiff failed to appeal the injunction rulings either by interlocutory appeal or by requesting a stay of the agency proceedings.

Wesmont Developers, Inc. v. Ravalli County (District Court of the Twenty-First Judicial District of Montana, December 13, 2007)

Summary:

(1) Agencies reviewing subdivision applications have the statutory right to request and consider additional information regarding mandatory subdivision requirements during the review process, even after an application has been deemed sufficient for review.

(2) The agency can immediately suspend a subdivision review decision once a required variance is denied (Section 76-3-604(2)(c), MCA), or the subdivider can agreed to an extension of the review period (Section 76-3-604(4)(a), MCA) in order to address the effect of the variance denial on the merits of the application under review. If neither of these occurs, denial of the subdivision application after denial of a required variance "virtually assures the denial cannot be found arbitrary or capricious" and that the application as proposed "will no longer contain sufficient information for a fair review."

(3) Although both the oral and written findings constitute the basis for the agency's decision, the 30-day review period for challenging a decision in district court runs from the date of the oral decision. (Sections 76-3-620, 76-3-625, MCA.)

Plaintiff developer challenged County's denial of its application for a Aspen Springs project, a 671-unit subdivision to be built in phases over 20 years. The application included requests for eight variances, most notably a variance from the subdivision requirement that roads in a proposed subdivision connect to a right-of-way or easement in adjacent platted areas to provide "proper inter-neighborhood traffic flow." The County ultimately denied both the road inter-connectivity variance and the subdivision application, and six months later issued findings of fact that the application as proposed was "insufficient" without the approved variance and

that the Commissioners vote on the merits of the subdivision application after denial of the variance was premature and extraneous, as no sufficient application was before them to consider.

The District Court considered both the plaintiff's and the County's motions for partial summary judgment. The court rejected the plaintiff's claim that the County waived its right to require the application to conform to the road connectivity requirement since it was not raised as an issue until after the subdivision application was deemed sufficient for review. Because the interconnectivity requirement was a mandatory subdivision requirement, and Section 76-3-604(2)(c) specifically provides that the reviewing agency may request additional information during the review process, the County was duty-bound to, and properly did – albeit belatedly – request such additional road connectively information during the review process.

The court also addressed the matter of whether the County's decision on the merits of the subdivision application after denial of the road inter-connectivity variance was premature and extraneous, warranting dismissal of the plaintiff's challenge to that decision. The County could have immediately suspended the subdivision review decision once the variance was denied (Section 76-3-604(2)(c), MCA), or the subdivider could have agreed to an extension of the review period (Section 76-3-604(4)(a), MCA), but neither of these occurred. Instead, the County proceeded to review a subdivision application that "virtually assure[d] the denial [could not] be found arbitrary or capricious" and would "no longer contain sufficient information for a fair review." (Opinion and Order, page 23.) The court held that the Commissioner's had incorporated their concerns regarding the proposal's failure to comply with the road inter-connectivity requirement into their decision on the subdivision application, and that decision was neither arbitrary nor capricious.

Finally, the court directed that the County give plaintiff 90 days to submit a revised preliminary application for the subdivision that specifically addresses the road inter-connectivity requirement, finding that plaintiff's remaining claims of unconstitutional takings, violation of due process and equal protection, and damages cannot be properly considered by the court, if at all, until after the County acts on a revised subdivision application.

Povsha, et al. v. City of Billings (Montana Supreme Court, 2007 MT 353, on appeal from the District Court of the Thirteenth Judicial District of Montana, December 19, 2007)

Summary: If challengers to a land use approval do not appeal a district court's denial of their request for an injunction against the project or seek to stay a judgment against them on appeal, the appellate court may not ultimately reach the merits of their case if the claims are mooted by the intervening construction of the project or sale of the property to third parties.

The third of the Montana Supreme Court's quartet of decisions this month on injunctions and appeals. In 2002, the plaintiff filed a lawsuit against the City and County seeking to enjoin and set aside an annexation of the subject property to the city and a zoning change thereof from "Agricultural-Open" to "Urban Study Area" to develop the area for commercial uses – namely, a wholesale auto auction. The district court denied plaintiff's request to enjoin the development and plaintiff did not appeal that decision; shortly thereafter, the city issued building permits and the auto auction business was constructed and completed. The district court eventually granted the city's motion for summary judgment, concluding the zoning change was

part of a gradual transition of the area from agricultural use to commercial use, that the use of the subject property for the auto auction was consistent with the uses in the surrounding area, and that the change did not constitute illegal spot zoning. As in *Henesh*, *supra*, the Montana Supreme Court held that plaintiff's appeal of the judgment was moot, since the plaintiff failed to appeal the injunction rulings either by interlocutory appeal or by requesting a stay of the agency proceedings, and the court could no longer restore the parties to their original positions.

Swan Lakers v. Board of County Commissioners of Lake County ((Montana Supreme Court, DA 07-0619, on appeal from the District Court of the Twentieth Judicial District of Montana, December 19, 2007)

Summary: If challengers to a land use approval appeal a district court's denial of their request for an injunction against the project or seek to stay a judgment against them on appeal, the appellate court will ultimately reach the merits of their case if the intervening approval or construction of the project or sale of the property to third parties pending appeal threatens to moot the claims.

The last of the Montana Supreme Court's quartet of decisions this month on injunctions and appeals, and the only one to grant the plaintiff's the relief sought. In October, the district court rejected the plaintiff community group's challenge to the County's approval of the Kootenai Lodge Condominiums major subdivision, holding that the organization lacked standing as an aggrieved party as defined in the Subdivision and Platting Act and other state statutes, and granting the developer's motion for summary judgment on plaintiff's constitutional claims. (*See* CTAP Legal Updates, October 2007.)

The organization appealed that decision to the Montana Supreme Court and requested an injunction against the developer, seeking to halt the sale of any lots until a final decision on the merits of the case is issued by the Supreme Court. The Supreme Court granted the request for the injunction in combination with an expedited briefing and hearing schedule on the appeal. The Court provided no analysis of the parties' likelihood of prevailing on the merits, but noted that the complexity and changing nature of the district court proceedings and the willingness of the parties to brief the appeal quickly made an injunction appropriate. The court distinguished this case from *Henesh*, *supra*, noting that here the plaintiffs had sought to enjoin the project from the beginning, but the complexity of the proceedings below had resulted in a failure to stop the approval process. The Court rejected the developer's claims that the injunction had not first been requested from the district court; that the request was moot because the County had already approved the subdivision; and that a bond should be required if the injunction was granted. Expect a final decision by the court on the merits of the standing issue in early 2008.

Takings

Action Apartment Association v. Santa Monica Rent Control Board (9th Circ., on appeal from the United States District Court for the Central District of California, December 3, 2007)

Summary: In an action claiming that existing and new provisions of Santa Monica's rent control ordinance is unconstitutional under the "public use" component of the Fifth Amendment's Takings Clause and the substantive component of the Fourteenth Amendment's Due Process Clause, dismissal of the complaint is affirmed where: 1) the Fifth Amendment claims were not viable; 2) the facial due process claim was time-barred, and 3) the as-applied due process claim was unripe.

Santa Monica's rent control ordinance, originally enacted in 1979, has been upheld in both state and federal courts against due process and takings challenges. This latest challenge to the ordinance involved amendments made in 2002, including provisions that made it harder for landlords to evict their tenants.

First, the Court held that the minor amendments to the ordinance in 2002 were not sufficient to alter its previous holding that the ordinance was a rational means of controlling rapidly rising rents and addressing a housing shortage, rejecting the plaintiffs' public use challenge to the amended ordinance.

The Court then reiterated the holding of Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 532 (2005) in the 9th Circuit, noting the question of whether or not a governmental action substantially advances a legitimate public purpose is a claim lying solely in substantive due process and not takings. (See discussion of Crown Point Development, Inc. v. City of Sun Valley, et al., CTAP Legal Updates, November 2007.)

However, plaintiffs' facial and as-applied due process challenges to the provisions of the ordinance that have been in effect since 1979 are time-barred by California's two-year statute of limitations for Section 1983 claims, the same limitations period applicable to federal takings claims. Plaintiffs' challenge to the new eviction provisions of the ordinance enacted in 2002, which have not been enforced against them and may or may not ever apply to those plaintiffs, are not ripe for judicial review.

Environmental Law

Sierra Club v. Bosworth (9th Circ., on appeal from the United States District Court for the Eastern District of California, December 5, 2007)

Summary: Categorical exclusion from the National Environmental Policy Act (NEPA) for fuel reduction activities in national forests nationwide was not properly assessed for cumulative impacts; injunction issued against the use of the exclusion until adequate assessment completed. Agencies do not need to perform NEPA review to promulgate new categorical exclusion but the reasonableness of the decision to adopt it must be adequately supported by the evidence in the record.

The Sierra Club challenged that the U.S. Forest Service and Department of Agriculture established a categorical exclusion for all national forest fuel reduction projects up to 1,000 acres and prescribed burn projects up to 4,500 acres in violation of NEPA. The proposed categorical exclusion allowed for fuel reduction activity without environmental review, and changed the language in the agency environmental review handbook to allow for the use of the categorical exclusion even when a listed resource condition (such as steep slopes, highly erosive soils, threatened or endangered species, flood plains, wetlands, wilderness, etc.) exists. Previously the existence of any of these conditions in an area proposed for fuel reduction would have precluded the use of a categorical exemption.

The district court granted summary judgment for the defendant agencies, and the appellate court reversed. The appellate court held that agencies are not required to prepare an environmental assessment/finding of no significant impact (EA/FONSI) or environmental impact statement (EIS) to examine the effects of promulgating a new categorical exclusion, but rather the agency's determination must be supported by evidence in the record demonstrating that an identified category of excluded actions will not individually or cumulatively have a significant impact on the environment.

The appellate court concluded that because the Forest Service failed to perform a programmatic cumulative impacts analysis for the categorical exclusion, and failed to consider the extent to which the impact of the fuels reduction projects on the environment was highly controversial and the risks uncertain, the promulgation of the exclusion was arbitrary and capricious. The court remanded the case to the district court, with instructions to enter an injunction precluding the Forest Service from implementing the fuel reduction categorical exclusion pending its completion of an adequate assessment of the significance of the use of this new categorical exclusion.

The Rattlesnake Coalition v. U.S. E.P.A., et al. (9th Circ., on appeal from the United States District Court for the District of Montana, December 7, 2007)

Summary: When plaintiffs do not obtain an injunction against an activity alleged to be done in violation of NEPA, the appellate court may not ultimately reach the merits of the case if the claims are mooted by the intervening completion of the project. Purely local projects funded in part by federal funds are not subject to NEPA unless there is sufficient federal involvement and control over the project.

Challenge by community group against the EPA and others under NEPA, seeking injunctive, declaratory, and other relief relating to the preparation of environmental review documents for

the Missoula Wastewater Facilities Plan Update ("Plan Update") and two of its constituent projects. During preparation of the Plan Update, the City applied for and was awarded a $5 million grant from the EPA to support completion of the treatment plant upgrade, one of the projects identified in the Plan Update, contingent upon compliance with NEPA. The EPA issued an EA and FONSI for the Plan Update in 2000, and the treatment plant upgrade was completed in October 2004. In 2004, Congress also appropriated $500,000 for the City's Rattlesnake Sewer Project, and the EPA advised it would undertake NEPA review specific to that project. The following day the plaintiff organization filed suit against the EPA and the City, alleging that the separate environmental review for the treatment plant, the sewer project, and the Plan Update was undertaken in violation of NEPA.

The appellate court upheld the district court's dismissal of the claims, holding: 1) the organization did not have standing to challenge the treatment plant upgrade, as the project had already been funded and completed; 2) the Plan Update was not a single, major federal action subject to NEPA requirements, since no federal funds were used to complete the Update, the Update was solely a local creation, and the federal government did not maintain decision-making authority over the Update as a whole; and 3) the claim against the EPA regarding NEPA review of the sewer project was premature, as an agency does not take final agency action within the meaning of the Administrative Procedure Act until it completes its review of a grant application and decides to disburse appropriated funds. Finally, the court upheld the dismissal of the city from the suit, noting that nonfederal entities cannot be defendants in a NEPA challenge.

The Court emphasized the importance of seeking immediate relief through a preliminary injunction as soon as a final agency decision is made, to avoid losing standing to pursue claims against the decision or rendering the case moot.

Center for Biological Diversity v. Lohn, et al. (9th Circ., on appeal from the United States District Court for the Western District of Washington, December 27, 2007)

<u>Summary</u>: *A federal agency's listing of a sub-species as endangered under the agency's Distinct Population Segment policy pending appeal of its previous failure to list that sub-species moots the lawsuit challenging the policy.*

An environmental group challenged the National Marine Fisheries Service's (NMFS) use of the "distinct population segment" policy (DPS policy), under which sub-populations of species are separately considered for listing under the Endangered Species Act (ESA) through an evaluation of three factors formulated by NMFS and the Fish and Wildlife Service in 1996. Using the DPS policy, the NMFS concluded the group's petition to list the Southern Resident population of killer whales was not warranted, and the group sued. The federal district court upheld the use of the DPS policy as consistent with congressional intent regarding the ESA, but nevertheless invalidated the decision on the grounds that NMFS failed to use the best available scientific data in analyzing the petition for listing the population. After the plaintiff group partially appealed the district court's ruling with respect to the DPS policy, NMFS issued a final rule listing the Southern Resident killer whale as an endangered species. The appellate court held the appeal was moot, as the relief sought by the group – an injunction and declaratory relief directing NMFS to list the population as endangered – had already been achieved.

Real Property Law

Leisz v. Avista Corp., et al. (Montana Supreme Court, 2007 MT 347, on appeal from the District Court of the Twentieth Judicial District of Montana, December 18, 2007)

Summary: A private easement by necessity may be established by evidence of previous use of the original location of an access road by predecessors-in-interest to the property owner. An implied easement by necessity must be based on a "unity of ownership" between the subject parcels and a strict necessity to access the parcel at the time the tracts were severed. Periodic use by the public of an access road across property to reach other property for recreational hunting, mushroom picking, and access to Forest Service land is insufficient to establish a public prescriptive easement.

Plaintiff purchased a parcel located south of defendants' parcels, through which she used a dirt access road to access her parcel. Evidence at trial indicated the parcel had been occupied in the 1980s by a caretaker, and in the 1920s, 30s, and 40s by homesteaders, all of whom had used the dirt access road – as originally located and then relocated in the mid-1985s – to access plaintiff's parcel. After purchasing the property, plaintiff requested permission from defendants to begin using the original location of the access road across defendant's property, and was refused. She thereafter bulldozed the access road and filed suit against defendants to establish either a private or public prescriptive easement, an easement by grant or reservation, or an implied easement by necessity across defendant's properties.

The court remanded the case to the district court for further consideration of whether plaintiff had established a private prescriptive easement across defendants' properties based on previous use of the original location of the access road during the homesteading period for approximately ten to twenty years. The court found that plaintiff had not established a private prescriptive easement across the relocated access road, as it was not used by her predecessor for the requisite five-year period. The court also found that plaintiff could not establish an implied easement by necessity, as even assuming the fact that concurrent ownership of the tracts by the U.S. Government could establish the requisite "unity of ownership," there was no necessity to access her parcel at the time the tracts were severed. The court also found that use of the access road by the public to reach plaintiffs' property for periodic, recreational hunting, mushroom picking, and access for Forest Service land was insufficient to give rise to a claim of a public prescriptive easement, and that plaintiff's claims of an easement by grant or reservation was duplicative of those unsuccessful public prescriptive easement claims.